

U.S. Department of Labor

Office of Administrative Law Judges
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Issue date: 17Jun2002

Case No. 2001-BLA-0188

In the Matter Of

THOMAS RYAN SALYER,

Claimant,

v.

BRANHAM & BAKER COAL COMPANY,

Employer,

and

OLD REPUBLIC INSURANCE COMPANY,

Carrier,

and

DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS,

Party-in-Interest.

APPEARANCES¹:

Gregory D. Allen, Esq.
Salyersville, Kentucky
For the Claimant

Lois A. Kitts, Esq.
Pikeville, Kentucky
For the Employer

BEFORE: DANIEL J. ROKETENETZ
Administrative Law Judge

¹ The Director, OWCP, was not present or represented by counsel at the hearing.

DECISION AND ORDER - DENIAL OF BENEFITS

This case arises from a claim for benefits under Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended by the Black Lung Benefits Act of 1977 (hereinafter referred to as "the Act"), 30 U.S.C. § 901 et seq., and the regulations issued thereunder, located in Title 20 of the Code of Federal Regulations. Regulation section numbers mentioned in this Decision and Order refer to sections of that Title.

On November 20, 2000, this case was referred to the Office of Administrative Law Judges by the Director, Office of Workers' Compensation Programs, for a hearing. (Dir. Ex. 33)² A formal hearing was held on November 27, 2001, before the undersigned.

ISSUES

The issues in this case are:

1. Whether the Claimant has pneumoconiosis as defined by the Act and the regulations;
2. Whether the Claimant's pneumoconiosis arose out of coal mine employment;
3. Whether the Claimant is totally disabled; and,
4. Whether the Claimant's disability is due to pneumoconiosis.

(Dir. Ex. 33, Tr. 8-9)

Based upon a thorough analysis of the entire record in this case, with due consideration accorded to the arguments of the parties, applicable statutory provisions, regulations, and relevant case law, I hereby make the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Background:

The Claimant, Thomas Ryan Salyer, was born on June 7, 1949, and has a tenth grade education. (Dir. Ex. 1, Tr. 10, 11) He has

² In this Decision and Order, "Dir. Ex." refers to the Director's exhibits, "Cl. Ex." refers to Claimant's exhibits, "Er. Ex." refers to Employer's exhibits, and "Tr." refers to the transcript of the hearing.

one dependent for purposes of possible benefits augmentation, namely, his wife, Goldie, whom he married on June 25, 1967. (Dir. Ex. 8, Tr. 10)

The Claimant testified that he began his coal mine employment in 1969. (Tr. 11) He started having problems breathing beginning in 1989. (Tr. 14) His treating physician is Dr. Charles Hardin. (Tr. 19) The Claimant stated that he did not believe he could perform the type of work required in his coal mine employment. (Tr. 20-21) The Claimant also testified that he is a current cigarette smoker. (Tr. 25)

The deposition testimony of the Claimant was taken on April 24, 2001. (Er. Ex. 6) The Claimant testified that he last worked in 1993, for Branham & Baker Coal Company, operating heavy machinery. He had held that position since commencing work with the company in 1984. As the result of a back injury, he quit working and received a Workers' Compensation award. He also received a Workers' Compensation award on the basis of coal worker's pneumoconiosis. The Claimant receives Social Security disability benefits. The Claimant testified that of the twenty-five years he has smoked cigarettes, he smoked a pack and a half for a total of five years.

Procedural History:

The Claimant filed his claim for benefits on December 20, 1999. (Dir. Ex. 23) The application was initially denied by the Department of Labor on March 23, 2000. (Dir. Ex. 16) The Claimant filed a timely request for a hearing, and on August 28, 2000, his claim was again denied. (Dir. Ex. 17, 27) The Claimant filed another request for a hearing, and on November 20, 2000, his claim was forwarded to the Office of Administrative Law Judges for a formal hearing. (Dir. Ex. 29, 33)

Length of Coal Mine Employment:

The parties have stipulated to seventeen years of coal mine employment. (Tr. 9) Based upon the documented evidence in the record, including the Social Security records, as well as the stipulation of the parties, I find that the Claimant was a coal miner as that term is defined by the Act and the regulations, for a total of seventeen years. The Claimant last worked as a coal miner in 1993. (Tr. 13, Dir. Exs. 1, 4-6)

The Claimant testified that he ran a drill, cleaned coal, ran a loader, drove a rock truck and ran a bulldozer while working at Branham & Baker Coal Company. (Tr. 13)

Applicable Regulations:

Because the claim was filed after March 31, 1980, the effective date of Part 718, it must be adjudicated under those regulations. Amendments to the Part 718 regulations became effective on January 19, 2001. Section 718.2 provides that the provisions of Section 718 shall, to the extent appropriate, be construed together in the adjudication of all claims.

Pneumoconiosis:

Section 718.202(a) sets forth four methods by which a claimant may establish the existence of pneumoconiosis under this part of the regulations. Under Section 718.202(a)(1), a chest x-ray conducted and classified in accordance with Section 718.102 may form the basis for a finding of the existence of pneumoconiosis.

Interpretations of several x-rays, taken between 1971 and 2000, are included in the record. Most interpretations were performed by B-readers³ and/or board-certified radiologists.

The chest x-ray taken on August 17, 1991, was read as negative by Dr. Sargent, a B-reader and board-certified radiologist. (Dir. Ex. 26) It was found to be unreadable by Drs. Wiot, and Spitz, both of whom are B-readers and board-certified radiologists. (Er. Ex. 1, 2) Drs. Spitz and Wiot apparently were only provided a lateral view. Dr. Wright found that x-ray to be positive. (Dir. Ex. 11)

The September 19, 1991, x-ray was read as negative by Dr. Westerfield, a B-reader. (Dir. Ex. 19) The September 26, 1991, chest x-ray was read as negative by Drs. Dineen and Jarboe, both of whom are B-readers. (Dir. Exs. 12, 19)

Drs. Jarboe, Spitz and Wiot read the February 11, 1999, chest x-ray as negative. (Dir. Ex. 12, Er. Exs. 1, 2) Dr. Wright found the x-ray to be positive. (Dir. Ex. 11)

³ A "B-reader" is a physician who has demonstrated proficiency in assessing and classifying x-ray evidence of pneumoconiosis by successful completion of an examination conducted by or on behalf of the United States Department of Health and Human Services. 42 C.F.R. § 37.51. The qualifications of physicians are a matter of public record at the National Institute for Occupational Safety and Health reviewing facility at Morgantown, West Virginia. Because "B-readers" are deemed to have more training and greater expertise in the area of x-ray interpretation for pneumoconiosis, their findings may be given more weight than those of other physicians. Taylor v. Director, OWCP, 9 BLR 1-22 (1986).

The October 18, 1999, chest x-ray was read as negative by Dr. Jarboe. (Dir. Ex. 12)

The January 19, 2000, chest x-ray was read as negative by Drs. Sargent, Spitz and Wiot. (Dir. Exs. 10, 28, 32) It was also read as negative by Dr. Younes, a B-reader. (Dir. Ex. 9)

Dr. Broudy, a B-reader, read the April 21, 2000, chest x-ray as negative. (Dir. Ex. 20)

The only positive readings were rendered by Dr. Wright, who is neither a B-reader nor a board-certified radiologist. All of the B-readers and/or board-certified radiologists found the x-rays they read to be negative. Under Part 718, where the x-ray evidence is in conflict, consideration shall be given to the readers' radiological qualifications. Dixon v. North Camp Coal Co., 8 BLR 1-344 (1985). Thus, it is within the discretion of the administrative law judge to assign weight to x-ray interpretations based on the readers' qualifications. Goss v. Eastern Associated Coal Co., 7 BLR 1-400 (1984). Accordingly, greater weight may be assigned to an x-ray interpretation of a B-reader and board-certified radiologists. Aimone v. Morrison Knudson Co., 8 BLR 1-32 (1985). In the instant case, as noted, all of the B-readers who are also board-certified radiologists found the x-ray evidence to be negative.

The record also contains a vast majority of negative interpretations. It is within the discretion of the administrative law judge to defer to the numerical superiority of the x-ray interpretations. Edmiston v. F & R Coal Co., 14 BLR 1-65 (1990). The United States Court of Appeals for the Sixth Circuit, under whose appellate jurisdiction this case arises,⁴ has confirmed that consideration of the numerical superiority of the x-ray interpretations, when examined in conjunction with the readers' qualifications, is a proper method of weighing x-ray evidence. Staton v. Norfolk & Western Railway Co., 65 F.3d 55(6th Cir. 1995) (citing Woodward v. Director, OWCP, 991 F.2d 314 (6th Cir. 1993)). Consequently, I find that the preponderance of the x-ray evidence, as reviewed by several B-readers and board-certified radiologists, fails to establish the existence of pneumoconiosis under Section 718.202(a)(1).

⁴ The Benefits Review Board has held that the law of the circuit in which the Claimant's last coal mine employment occurred is controlling. Shupe v. Director, OWCP, 12 BLR 1-200 (1989). The Claimant's last coal mine employment took place in Kentucky, which falls under the Sixth Circuit's jurisdiction.

A biopsy conducted and reported in compliance with Section 718.106 may also be the basis for a finding of the existence of pneumoconiosis. § 718.202(a)(2). However, no biopsy evidence exists in the record, and thus, this section is inapplicable in this case.

Section 718.202(a)(3) provides that it shall be presumed that the miner is suffering from pneumoconiosis if the presumptions described in Sections 718.304, 718.305 or 718.306 are applicable. No x-ray evidence of complicated pneumoconiosis is present in the record, thus Section 718.304 does not apply. Section 718.305 does not apply because it pertains only to claims that were filed before January 1, 1982. Finally, Section 718.306 is not relevant because it is only applicable to claims of deceased miners.

The fourth and final way to establish the existence of pneumoconiosis is set forth in Section 718.202(a)(4). This subsection provides for such a finding where a physician, exercising sound medical judgment, notwithstanding a negative x-ray, finds that the miner suffers from pneumoconiosis. Any such finding shall be based upon objective medical evidence and shall be supported by a reasoned medical opinion. A reasoned opinion is one which contains underlying documentation adequate to support the physician's conclusions. Fields v. Island Creek Coal Co., 10 BLR 1-19, 1-22 (1987). Proper documentation exists where the physician sets forth the clinical findings, observations, facts and other data on which he bases his diagnosis. Id. Upon review of the medical opinion evidence, I find that the better-reasoned and better-documented reports of record establish that no evidence of pneumoconiosis, radiographic or otherwise, is present.

Dr. B. T. Westerfield examined the Claimant on September 19, 1991. (Dir. Ex. 12) Dr. Westerfield recorded a twenty-six pack year cigarette smoking history, the Claimant having quit smoking six months earlier. Based upon the taking of histories, including coal mine employment, and an examination, Dr. Westerfield diagnosed (1) history of exposure to coal dust; (2) history of shortness of breath; and (3) history of cigarette smoking. Dr. Westerfield concluded that the Claimant did not have an occupational lung disease caused by his coal mine employment, finding that the Claimant retained the pulmonary capacity to do his usual coal mine employment.

Dr. Thomas M. Jarboe examined the Claimant on September 26, 1991. (Dir. Ex. 12) Dr. Jarboe recorded a work history which ceased in March of 1991, because the mine shut down and the Claimant had suffered a back injury. The Claimant had sixteen years in strip mining with twelve years of heavy equipment operating. A cigarette smoking history starting at the age of sixteen years and averaging

about one pack per day was listed. Dr. Jarboe stated that the Claimant would quit smoking for six months, and that he did this three or four times. Based upon his examination, which included the taking of a chest x-ray, pulmonary function testing and blood gas studies, Dr. Jarboe diagnosed chronic bronchitis with airways obstruction caused by cigarette smoking. While the Claimant stated that he had not been smoking for the past six months, Dr. Jarboe found the Claimant's carboxyhemoglobin levels would indicate continued, significant exposure to cigarette smoke. Dr. Jarboe found that the Claimant did not suffer from an occupational lung disease. The Claimant's minor airways obstruction was due solely to his long history of smoking cigarettes, and he was physically able, from a pulmonary standpoint, to do his usual coal mine work, given that his function exceeded Federal limits for disability in coal workers. Dr. Jarboe found that under AMA Guidelines, the Claimant had no impairment (Class 1).

Dr. John F. Dineen examined the Claimant on September 27, 1991. (Dir. Ex. 12) Dr. Dineen recorded that the Claimant was a coal miner for sixteen years until being laid off in April of 1991. A cigarette smoking history of one pack per day for eighteen years was recorded. Based upon his examination, which included review of the September 26, 1991, chest x-ray and pulmonary function study, Dr. Dineen opined that the Claimant had chronic bronchitis secondary to his habit of cigarette smoking. He found that the Claimant did not have coal worker's pneumoconiosis, and that the Claimant retained the pulmonary capacity to perform his duties as a coal miner. Dr. Dineen is board-certified in internal medicine and pulmonary disease.

Dr. Ballard Wright submitted a report after examining the Claimant on February 11, 1999. (Dir. Ex. 11) Dr. Wright recorded twenty-four years as a surface miner in the coal mining industry operating heavy machinery, and a smoking history of one pack per day for the last twenty-five to thirty years. Dr. Wright also recorded that he had diagnosed the Claimant as suffering from Category 1, simple pneumoconiosis when he saw him on August 17, 1991. Based upon his examination, which included the taking of histories, chest x-ray, pulmonary function testing and electrocardiogram, Dr. Wright found the Claimant to be suffering from coal worker's pneumoconiosis, category 2/1, and chronic obstructive pulmonary disease, minor severity. It was his opinion that the Claimant's condition was related to his work environment. Dr. Wright found a 25 percent impairment, consisting of a Class II impairment, Table 8, Chapter 5, Page 162. In his opinion, the Claimant did not retain the physical capacity to return to his last coal mine work. Dr. Wright explained that coal worker's pneumoconiosis is associated with chronic obstructive pulmonary disease with and without smoking and therefore, it was a major

contributor to the Claimant's pulmonary impairment.

Dr. Jarboe examined the Claimant again on October 18, 1999. (Dir. Ex. 12) Dr. Jarboe recorded a cigarette smoking history commencing at the age of eighteen or nineteen years, noting that the Claimant believed he had been smoking a pack per day for the last ten years, having smoked less than that previously. Twenty years of coal mine employment was recorded, the Claimant having quit after sustaining an injury to his back and neck when he fell from a bulldozer while working. Based upon his examination, which included the taking of a chest x-ray, pulmonary function and blood gas testing, Dr. Jarboe found a marked elevation of carboxyhemoglobin compatible with smoking two packages of cigarettes per day. He diagnosed (1) chronic bronchitis based on history of chronic cough with a.m. sputum production; and (2) probable pulmonary emphysema, based on marked depression of expiratory breath sounds, presence of airflow obstruction on spirometry and long history of cigarette smoking. In his opinion, the Claimant's disease was not the result of exposure to coal dust. His pulmonary conditions were the result of his long history of cigarette smoking. Dr. Jarboe based his conclusion on the fact that the Claimant did not have coal worker's pneumoconiosis on chest radiograph and the pulmonary function testing was not compatible with a dust induced lung disease. The spirometric pattern was typical of that seen in cigarette induced lung disease.

Dr. Maan Younes examined the Claimant on January 19, 2000. (Dir. Ex. 9) He recorded twenty-five years of coal mine employment and a cigarette smoking history of one pack per day, starting at the age of twenty-one years. Based upon his examination, which included the taking of a chest x-ray, pulmonary function study, blood gas testing and electrocardiogram, Dr. Younes diagnosed (1) chronic obstructive pulmonary disease by spirometry and chronic bronchitis, history of cough and sputum. Dr. Younes found both conditions to be related to tobacco smoking, with the second condition also being related to occupational dust exposure. Dr. Younes found a moderate obstructive ventilatory impairment which may interfere with the Claimant's last coal mining job.

Dr. Bruce Broudy examined the Claimant on April 21, 2000. (Dir. Ex. 20) Dr. Broudy recorded a work history of 17 to 20 years of coal mining. Based upon his examination, which included the taking of histories, chest x-ray, blood gas study and pulmonary function testing, Dr. Broudy concluded that the Claimant had chronic bronchitis with very slight chronic airways obstruction. He did not believe that the Claimant had coal worker's pneumoconiosis, further finding that he retained the respiratory capacity to perform the work of an underground coal miner or to do similarly arduous manual labor. Dr. Broudy is board-certified in

Internal Medicine and Pulmonary Disease.

By report dated July 9, 2000, Dr. Charles Hardin stated that he had been treating the Claimant since 1988 for shortness of breath due to respiratory problems. (Dir. Ex. 24) Dr. Hardin stated that the Claimant had a history of twenty-four years of surface mining, operating heavy equipment. He noted that the Claimant had been diagnosed with Category 1 simple pneumoconiosis in 1991, and subsequently was diagnosed with Category 2 pneumoconiosis. Dr. Hardin stated that since then, the Claimant's respiratory problems had increased especially over the last few years. Dr. Hardin found that the Claimant suffered from marked respiratory problems as a result of his coal worker's disease. It was his opinion that the Claimant did not retain the capacity to return to his former employment due to his severe respiratory impairments secondary to coal worker's pneumoconiosis. Dr. Hardin found that while the Claimant did smoke, the Claimant's respiratory function "would be significantly impaired even if he were a nonsmoker due to his severe Coal Worker's Pneumoconiosis." Dr. Hardin listed a pulmonary function study performed in February of 1999, which produced an FEV1 of 3.05 and an FVC of 4.71.

Dr. Broudy reviewed the medical evidence of record by report dated July 26, 2000. (Dir. Ex. 25) Based upon his review, Dr. Broudy concluded that the Claimant was not suffering from coal worker's pneumoconiosis. He also found no evidence of any impairment arising from inhalation of coal mine dust. At most, the Claimant had mild obstruction resulting from his chronic heavy cigarette smoking habit.

The deposition testimony of Dr. Broudy was taken on February 14, 2001. (Er. Ex. 3) Dr. Broudy stated that he found no impairment or disability arising from the inhalation of coal mine dust.

Dr. Robert J. Farney submitted a report on March 31, 2001, after reviewing the medical evidence. (Er. Ex. 4) He found the records revealed that the Claimant had chronic bronchitis and mild obstructive airway disease secondary to cigarette smoking. He did not find coal worker's pneumoconiosis to be present, further finding the absence of a disabling respiratory impairment. In his opinion, the Claimant was not impaired from performing his last regular job as a heavy equipment operator.

By report dated April 9, 2001, Dr. Gregory J. Fino reviewed the evidence of record. (Er. Ex. 5) Based upon his review, Dr. Fino concluded that the Claimant did suffer from chronic bronchitis which was not causing any impairment, and which was due to cigarette smoking. Dr. Fino did not find simple coal worker's pneumoconiosis to be present, further finding no respiratory impairment. Dr. Fino is board-certified in Internal Medicine and

in Pulmonary Disease.

The deposition testimony of Dr. Jarboe was taken on April 24, 2001. (Er. Ex. 7) Dr. Jarboe is board-certified in Internal Medicine and Pulmonary Disease. Dr. Jarboe testified that he examined the Claimant in 1991 and again in 1999. He explained that the most common type of abnormality, from a pulmonary standpoint, found in a person with the Claimant's smoking history would be an obstructive defect on spirometry, chronic cough, mucous production and wheezing of the chest, as well as shortness of breath. Upon his examination of the Claimant, Dr. Jarboe found diminished breath sounds, both inspiratory and expiratory, probably the result of underlying pulmonary emphysema, which was the result of cigarette smoking. The pulmonary function testing revealed a mild obstructive ventilatory defect, which was due to cigarette smoking. This could be determined by looking at the relationship between the FVC and FEV1. Arterial blood gases were normal except for the carboxyhemoglobin level which was significantly elevated and compatible with the smoking of about two packs of cigarettes per day. In his opinion, the Claimant retained the respiratory capacity to return to his previous coal mine work, and he did not suffer from coal worker's pneumoconiosis.

The deposition testimony of Dr. Hardin was taken on October 19, 2001. (Cl. Ex. 1) Dr. Hardin testified that he began treating the Claimant in 1987. Dr. Hardin stated that he had had the opportunity to review the reports provided by Dr. Wright. Dr. Hardin found that the Claimant's condition had appreciably worsened over the thirteen years in which he had been treating him. He diagnosed the Claimant as suffering from COPD and coal worker's pneumoconiosis, finding that the Claimant did not retain the breathing capacity to do his previous work as a surface miner, or any manual labor.

Upon cross-examination, Dr. Hardin stated that he has never conducted pulmonary function testing on the Claimant, relying instead on the studies performed by Dr. Wright's office. He stated that he had been provided with Dr. Wright's study of February 11, 1999, but was not provided with any of the other pulmonary function studies performed by other physicians. Dr. Hardin testified that he relied upon the findings rendered by Dr. Wright, who in his opinion, is an excellent physician. While not familiar with the B-reader criteria, Dr. Hardin believed Dr. Wright had the testing qualifications required to read x-rays for the evidence of coal worker's pneumoconiosis. Even if advised that numerous board-certified radiologists had read the x-ray evidence as negative, Dr. Hardin stated that he would rely upon Dr. Wright's findings. Dr. Hardin stated that his opinion regarding the Claimant's condition was based upon the Claimant's "clinical response, his history and

[Dr. Hardin's] experience with people who work in the mines in this area and who smoke and the lung problems we have in Eastern Kentucky." In his opinion, even if the Claimant had obtained normal pulmonary function study values, this would not change his final assessment.

A review of the medical opinion evidence reveals that, in 1991, Drs. Westerfield, Jarboe and Dineen found that the Claimant was not suffering from coal worker's pneumoconiosis. In 1999, Drs. Jarboe and Broudy examined the Claimant and found that he was not suffering from coal worker's pneumoconiosis. Drs. Fino and Farney, both of whom reviewed the medical evidence of record, concurred with this assessment. By contrast, Drs. Younes, Wright and Hardin found the Claimant to be suffering from coal worker's pneumoconiosis.

While Dr. Younes finds the chest x-ray to be negative, he finds the Claimant to be suffering from a moderate obstructive impairment upon pulmonary function testing and diagnoses chronic obstructive pulmonary disease and chronic bronchitis which is primarily due to tobacco smoking, and secondarily due to occupational dust exposure. He fails, however, to explain how he is able to determine the etiology of the Claimant's pulmonary conditions. I do not find his opinion well-reasoned or well-documented given this deficiency.

Dr. Wright finds pneumoconiosis by chest x-ray; however, he is neither a B-reader nor a board-certified radiologist, and all of the readings by the more highly-qualified physicians were negative for the disease. Dr. Wright had previously examined the Claimant in 1991, finding simple coal worker's pneumoconiosis to be present, again relying primarily on his own chest x-ray reading, when the more highly-qualified physicians found that evidence to be negative for the disease. Furthermore, this finding of pneumoconiosis in 1991, is contrary to the conclusion reached by pulmonary specialists, Drs. Westerfield, Jarboe, and Dineen, during that same year, and after their thorough examinations of the Claimant.

In his report from 1999, Dr. Wright states that the Claimant has worked some 24 years in coal mining and this is the cause of his current pulmonary disease and condition. He fails to explain how he can determine that the condition is the result of coal mine dust exposure as opposed to tobacco abuse, appearing to rely primarily upon his positive x-ray reading and the length of the Claimant's coal mine employment. This, in my opinion, does not constitute a reasoned opinion.

Dr. Hardin, the Claimant's treating physician, relies upon the

positive reading by Dr. Wright, as well as the pulmonary function testing performed by Dr. Wright, to conclude that the Claimant is suffering from disabling coal worker's pneumoconiosis. In his deposition testimony, Dr. Hardin asserts his complete confidence in the medical opinion and findings of Dr. Wright, having seen no laboratory data obtained by other physicians who examined the Claimant. His reliance upon the medical reports of Dr. Wright renders his conclusions suspect, given that I have determined that Dr. Wright's medical report is neither well-reasoned nor well-documented. Dr. Hardin fails to explain how he reaches his conclusion that the Claimant's respiratory problems are the result of coal worker's pneumoconiosis as opposed to cigarette smoking. In this respect, his cursory statement that "while [the Claimant] does smoke I feel that [his] respiratory function would be significantly impaired even if he were a nonsmoker due to his severe coal worker's pneumoconiosis," does not adequately explain why or how he reaches this conclusion, or on what basis he finds the Claimant's coal worker's pneumoconiosis to be severe. Indeed, his finding of severe coal worker's pneumoconiosis appears to be based primarily upon the finding of 2/1 pneumoconiosis by Dr. Wright, a finding which is rendered questionable by the negative readings of the x-rays by Drs. Sargent, Spitz, and Wiot, all of whom are B-readers and board-certified radiologists, as well as by the negative readings by B-readers, Drs. Broudy, Jarboe, Dineen and Younes.

Drs. Broudy and Jarboe provide detailed explanations of how they are able to exclude coal dust as an aggravating factor in the Claimant's respiratory problems. By contrast, an explanation of how Drs. Hardin, Younes and Wright are able to include coal dust as an aggravating factor, in light of the Claimant's extensive cigarette smoking history, is lacking. Their reliance upon the Claimant's long history of coal mine employment, and on the part of Drs. Hardin and Wright, a positive chest x-ray reading, is not sufficient to render their opinions well-reasoned or well-documented. Cornett v. Benham Coal, Inc., 227 F.3d 569 (6th Cir. 2000).

While §718.104(d) acknowledges the special status of a treating physician and medical opinions rendered by same, the weight given to any such physician's opinion "shall also be based on the credibility of the physician's opinion in light of its reasoning and documentation, other relevant evidence and the record as a whole." See §718.104(d)(5). Thus, it has been held that a judge is not required to accord greater weight to the opinion of a treating physician based solely on his status as such. Tedesco v. Director, OWCP, 18 BLR 1-103 (1994). This is but one factor to be taken into consideration. Other factors include whether the report is well-reasoned and well-documented. McClendon v. Director, OWCP,

12 BLR 2-108 (11th Cir. 1988). Weighing all relevant factors, and for the reasons set forth above, I find that the report of Dr. Hardin is not entitled to greater weight due to his status as the Claimant's treating physician.

In sum, I find that the preponderance of the medical report evidence indicates that the Claimant does not suffer from coal workers' pneumoconiosis. As a result, the Claimant fails to establish the existence of pneumoconiosis pursuant to § 718.202(a)(4), and indeed by any of the regulatory standards. As the existence of pneumoconiosis is the threshold issue in any claim for black lung benefits under the Act, entitlement to benefits under the Act is not established.

Total Disability:

Assuming, arguendo, that the Claimant had established the existence of pneumoconiosis, the Claimant nonetheless is ineligible for benefits because the evidence, when examined in its entirety, fails to establish that he is totally disabled. If the Claimant is to prevail in his claim for benefits, the evidence must demonstrate that he is totally disabled within the meaning of the Act. Total disability is defined as the miner's inability, due to a respiratory or pulmonary impairment, to perform his or her usual coal mine work or to engage in comparable gainful work in the immediate area of the miner's residence. § 718.204(b). Total disability can be established pursuant to one of the four standards in Section 718.204(b)(2) or the irrebuttable presumption of Section 718.304, which is incorporated into Section 718.204(b). The presumption is not invoked here because there is no x-ray evidence of large opacities classified as category A, B, or C, and no biopsy or equivalent evidence.

Where the presumption does not apply, a miner shall be considered totally disabled if he meets the criteria set forth in Section 718.204(b)(2), in the absence of contrary probative evidence. Subsection (b)(2)(i) of Section 718.204 provides for a finding of total disability where pulmonary function tests demonstrate FEV₁⁵ values less than or equal to the values specified in the Appendix to Part 718 and such tests reveal FVC⁶ values or MVV⁷ values equal to or less than the applicable table values.

⁵ Forced expiratory volume in one second.

⁶ Forced vital capacity.

⁷ Maximum voluntary ventilation.

Alternatively, a qualifying FEV₁ reading together with an FEV₁/FVC ratio of 55 percent or less may be sufficient to prove a totally disabling respiratory impairment under this subsection of the regulations. §718.204(c)(1) and Appendix B. Assessment of these results is dependent on the Claimant's height which was recorded as 71, 72, 72.5, 72.7 and 73 inches. Considering this discrepancy, I find the Claimant's height to be 72.5 inches for the purpose of evaluating the pulmonary function studies. Protopappas v. Director, OWCP, 6 BLR 1-221 (1983).

There are several pulmonary function studies in the record. None of them produced values indicative of total disability. Thus, studies conducted on February 7, 1991, August 17, 1991, September 19, 1991, September 26, 1991, February 11, 1999, June 22, 1999, October 7, 1999, October 18, 1999, January 19, 2000, and April 21, 2000, failed to produce qualifying values. (Dir. Exs. 9, 11, 12, 24) As such, I find that total disability has not been established pursuant to §718.204(b)(2)(i).

Section 718.204(b)(2)(ii) provides for the establishment of total disability through the results of arterial blood gas tests. Blood gas tests may establish total disability where the results demonstrate a disproportionate ratio of pCO₂ to pO₂, which indicates the presence of a totally disabling impairment in the transfer of oxygen from the claimant's lung alveoli to his blood. § 718.204(c)(2) and Appendix C. The test results again must meet or fall below the table values set forth in Appendix C following Section 718 of the regulations. None of the blood gas studies of record produced values indicative of total disability. (Dir. Exs. 9, 12, 20) I find that the blood gas study evidence of record fails to establish total disability under subsection (b)(2)(ii).

Total disability under Section 718.204(b)(2)(iii) is inapplicable because the Claimant failed to present evidence of cor pulmonale with right-sided congestive heart failure.

Finally, the Claimant can establish total disability due to pneumoconiosis under Section 718.204(b)(2)(iv). Where total disability cannot be established under subparagraphs (c)(1), (c)(2) or (c)(3), Section 718.204(c)(4) provides that total disability may nevertheless be found if a physician exercising reasoned medical judgment, based on medically acceptable clinical and laboratory diagnostic techniques, concludes that a miner's respiratory or pulmonary condition prevents the miner from engaging in his usual coal mine work or comparable and gainful work.

Given that pneumoconiosis is a progressive disease, I find the medical examinations from 1999 forward to be worthy of greater weight on the issue of the Claimant's present pulmonary abilities

than those which were performed in 1991. Based upon those medical opinions, I find that the medical opinion evidence clearly does not support a finding of total disability due to pneumoconiosis. In this respect, I do not find the reports of Drs. Hardin and Wright to be well-documented or well-reasoned, and accord greater weight to the reports of Drs. Broudy and Jarboe, supported as they are by the opinions of the reviewing physicians, Drs. Fino and Farney. I find the report of Dr. Younes to be equivocal at best, given that he concludes that the Claimant's coal worker's pneumoconiosis "may" interfere with his ability to work.

While Drs. Wright and Hardin find that the Claimant is disabled from performing his usual coal mine work, I do not find their medical opinions to be well-reasoned or well-documented. Dr. Hardin concedes that he has not seen the pulmonary function studies performed by any physician other than Dr. Wright, and therefore he did not have the benefit of reviewing and considering those studies which produced even higher values than those obtained by Dr. Wright. His opinion, and that of Dr. Wright, are not supported by the objective laboratory data, a discrepancy both fail to address or explain. These physicians provide no explanation for their finding of disability apart from the Claimant's known occupational exposure, the pulmonary function study performed by Dr. Wright and Dr. Wright's reading of the February, 1999, chest x-ray. As previously noted, the majority of x-ray readings by the more highly qualified physicians was negative for the disease. Furthermore, the pulmonary function study upon which they rely produced values well above those which are indicative of total disability, and none of the other pulmonary function studies of record produced qualifying values. Given the absence of any rationale for their reliance upon these findings, and how these findings support their conclusions, the reports of Dr. Wright and Hardin are clearly deficient and insufficient to meet the Claimant's burden of proof.

It is the Claimant's burden to affirmatively establish that he is suffering from coal worker's pneumoconiosis and that he is totally disabled due to the disease. See Director, OWCP v. Greenwich Collieries, 512 U.S. 267 (1994). I do not find the medical evidence sufficient to establish same.

Drs. Broudy, Jarboe, Farney and Fino find that the Claimant is not suffering from pneumoconiosis or total disability due thereto. The opinions of these physicians are supported by the great weight of the objective laboratory data in the record and by their well-reasoned medical reports. Based upon their reports, and taking into account their excellent credentials, I find that the evidence fails to establish total disability due to pneumoconiosis pursuant to §718.204(b)(2)(iv).

Total Disability Due to Pneumoconiosis:

As the Claimant has failed to establish total disability, he has also failed to establish total disability due to pneumoconiosis per §718.204(c)(1). Total disability due to pneumoconiosis requires that pneumoconiosis, as defined in §718.201, be a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment. Substantially contributing cause is defined as having a "material adverse effect on the miner's respiratory or pulmonary condition" or as "materially worsen[ing] a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment." §718.204(c)(1)(i) and (ii). Absent a showing of cor pulmonale or that one of the presumptions of §718.305 are satisfied, it is not enough that a miner suffer from a disabling pulmonary or respiratory condition to establish that this condition was due to pneumoconiosis. See §718.204(c)(2). Total disability due to pneumoconiosis must be demonstrated by documented and reasoned medical reports. Id. In interpreting this requirement, the Sixth Circuit has stated that pneumoconiosis must be more than a "de minimus or infinitesimal contribution" to the miner's total disability. Peabody Coal Co. v. Smith, 12 F.3d 504, 506-507 (6th Cir. 1997)

The evidence fails to establish that the Claimant is totally disabled due to pneumoconiosis pursuant to §718.204(c)(1). No evidence of cor pulmonale or evidence satisfying the presumptions of §718.305 has been offered. For the reasons set forth above, I find that the reports of Drs. Wright, Hardin and Younes are insufficient to establish a finding of total disability due to pneumoconiosis. Drs. Jarboe and Broudy, who are pulmonary specialists, determined that the Claimant does not suffer from any respiratory or pulmonary impairment, a finding supported by Drs. Fino and Farney, who reviewed the medical evidence of record, and by the more reliable objective laboratory data of record. Based upon their opinions, I find that total disability due to pneumoconiosis has not been established.

Entitlement:

As the Claimant has failed to establish the existence of pneumoconiosis or total disability stemming therefrom, I find that he is not entitled to benefits under the Act.

Attorney's Fees:

The award of an attorney's fee under the Act is permitted only in cases in which the claimant is found to be entitled to the receipt of benefits. Because benefits are not awarded in this

case, the Act prohibits the charging of any attorney's fee to the claimant for legal services rendered in pursuit of benefits.

ORDER

It is therefore ORDERED that the claim of Thomas Ryan Salyer for benefits under the Act is hereby DENIED.

A

DANIEL J. ROKETENETZ
Administrative Law Judge

NOTICE OF APPEAL RIGHTS

Pursuant to § 725.481, any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board within 30 days from the date of this decision, by filing a notice of appeal with the Benefits Review Board at P.O. Box 37601, Washington, D.C. 20013-7601. A copy of a notice of appeal must also be served on Donald S. Shire, Esquire, Associate Solicitor for Black Lung Benefits, Frances Perkins Building, Room N-2117, 200 Constitution Avenue, NW, Washington, D.C. 20210.